

Present were: Brown (Chair); Magenheim (Clerk); McDonough, Bargnesi and Boness, Members; and Oltman (Associate Member).

The meeting opened at 7:06 p.m.

Petition No.: 4048

Premises affected: 1 Riverside Dr

Petitioner: Charm Sciences

Members: Brown, Magenheim, McDonough, Bargnesi and Boness, and Oltman

On November 21, 2013 Rick Skiffington, VP of Charm Sciences notified the secretary that there was a mistake in the decision that was filed with the Town Clerk on November 18, 2013. He requested a technical change to the decision to accurately reflect the 1' setback to River Road, not the 7.1' setback noted in the decision. McDonough made a motion to correct the inconsistency in the decision's narrative findings noting that the conditions remain unchanged. Magenheim seconded the motion & the Board voted (6-0) to make the correction.

Petition No.: 4047

Premises affected: 138 Chandler Rd

Petitioner: New Cingular Wireless

Members: Brown, Magenheim, McDonough, Boness, and Oltman [Bargnesi did not participate]

Petitioner's counsel, Attorney Pare, had submitted a letter to request the public hearing be continued to 3/6/14 with an extension until April 2014. McDonough made a motion to continue the hearing to 3/6/14. Magenheim seconded the motion and the Board voted (5-0) to continue the hearing to 3/6/14.

Informal Presentation from Planning Staff

Planning Director, Paul Materazzo, and Planning Board Chair, Joan Duff, spoke to the Board about increased collaboration between Planning & Zoning on issues that both Boards deal with (i.e. zoning changes, certain projects that need review by both boards).

Petition No.: 4064

Premises affected: 10 Carisbrooke St

Petitioner: Clement

Members: Brown, Magenheim, McDonough, Bargnesi and Boness, and Oltman

Stephanie Clement represented himself & her husband in their request for a variance from 4.1.2 &/or a special permit under 3.3.5 to remove the existing front stairs & landing to construct a new, larger code compliant landing & stairs, neither of which meet the minimum front yard depth requirement. The landing will be 2'3" larger with a front setback of 21.6'. The house was built around 1910 & the existing stairs are too narrow & unsafe. Chair Brown asked Inspector of Buildings Clemente if the existing stairs are in violation of the Building Code. He confirmed that they are. McDonough questioned the dimensions on the plan depicting a 2' extension while Mrs. Clement states they will extend the landing 2'3". A revised plan was submitted. McDonough asked Inspector Clemente for the minimum landing size required by code. It is 3'. Brad Wheaton, 5 Summer St., spoke in favor. Bruce Reynolds asked if the proposed changes will meet code. Clemente confirmed that they will. McDonough made a motion to waive the site view & close the public hearing. Magenheim volunteered to sit off the remainder of the hearing. Boness seconded the motion & the Board voted (5-0) to waive the site view & close the hearing. The Board then proceeded to deliberate. Brown pointed

out that the house is a pre-existing, non-conforming structure & it was built prior to the adoption of the zoning bylaw, therefore a special permit under 3.3.5 can be granted with conditions that the new landing & stairs be constructed in substantial conformance with the plans submitted (SK2 & plot plan) and to deny the variance as moot. McDonough made a motion to grant a special permit with the conditions Brown stated & to deny the variance as moot. Boness seconded the motion & the Board voted (5-0) to grant the special permit with conditions & deny the variance as moot. Boness will write the decision.

Petition No.: 4065

Premises affected: 200 Andover Street

Petitioner: Shin

Members: Brown, Magenheimer, McDonough, Bargnesi and Boness, and Oltman

Mark Yannowitz, architect, represented Mr. Shin's request for a variance from Art. VIII, §4.1.2 to construct an addition at the rear of the building that will not meet the minimum side yard depth requirement. The commercial structure is located in the IG district & was constructed in 1870. It is an historic building that was built right along the side lot line & therefore is pre-existing, non-conforming. The addition will be 2 stories high, although part of it will only have one story inside. They have been to the Ballardvale Historic District Commission (BVHDC) for review. The hardship is the fact that the building was constructed on the side lot line & the lot is irregularly shaped. In March 2012, the ZBA granted a variance for a similar addition. Yannowitz summarized the difference between the previously approved addition & the current proposal, noting that the same materials, details & windows will be used. The proposed use (karate & training) is low impact. Parking requirements will be met. Magenheimer asked if the condition from the prior approval regarding screening for the immediate abutter is on the current plan. Yannowitz confirmed that it is. Kelly Higgins, 18 Dale St., Unit 2E, asked about the prior decision & if it is still valid. He added that they live in the nearest units to the proposed addition & will be the most impacted, submitting a plot plan of Ballardvale Crossing condominiums. He is opposed. Rio Sacchetti, 18 Dale St, Unit 3C, voiced concern over the shadows that will be cast onto the condos by the addition. Jeff Gao, 18 Dale St, Unit 2F, voiced concern over snow accumulation increasing due to the addition. The Board discussed the 23' ceiling height respecting the massing of the building. Yannowitz asked if they could consider it as a modification of the prior variance, even though it is not requested on the current application. Town Counsel Tom Urbelis explained the procedural issue that if the requested variance is denied, the applicant is prohibited from requesting the same relief for 2 years, and if the board is considering it as a modification, it may be best to continue the hearing to allow the applicant time to consider their options. McDonough agreed & Oltman suggested coming back with a stronger 1 storey proposal. Mike Bergeron, 18 Dale St, Unit 10B, voiced concern with BVHDC approval only being concerned with the historic aspect & the increased density along with decreased property values. Brown suggested continuing the hearing to February in order for the applicant to back to BVHDC on 1/8/14. Town Counsel informed the Board that the permit extension act may include the prior variance from 2012. McDonough made a motion to continue the hearing to 1/2/14. Magenheimer seconded the motion & the Board voted (6-0) to continue to 1/2/14.

Petition No.: 4066

Premises affected: 16 Haverhill St

Petitioner: Ellis

Members: Brown, Magenheimer, McDonough, Bargnesi and Boness, and Oltman

Susan Ellis represented herself in her request for a special permit to operate an electrolysis & laser treatment business (a personal service establishment) in the IA district. She has a 1200 sq. ft. unit & 2 employees, including herself, with approximately 8-10 clients per day. Clients are treated one at a time. The equipment includes an epilator & laser machines that hum & beep at very low volumes. Other businesses in the building include dentists, chiropractors,

physical therapists, acupuncturists, and photographers, among others. The business will operate primarily in the afternoon & evenings hours with alternating Saturday hours from 8 am – 8 pm. She has a 5 yr lease & parking is provided on site. The Board waived a site view. McDonough made a motion to close the public hearing. Boness seconded the motion & the Board voted (6-0) to close the hearing. Boness sat of the remainder of the hearing. The Board then proceeded to deliberate. Brown suggested granting a special permit with the condition that it be specific to Susan Ellis, that is not transferable to anyone else and that it shall expire upon termination of the lease or expiration of the lease without renewal of the lease. McDonough made the motion as stated by Brown, Magenheim seconded the motion & the Board voted (5-0) to grant the special permit with conditions. McDonough will write the decision.

Petition No.: 3956

Premises affected: 0 Lowell St & 0 Greenwood Rd

Petitioner: Monogram Residential Property Andover, LLC

Members: Brown, Magenheim, McDonough, Bargnesi and Boness, and Oltman

Attorney Jim Ward, representing Monogram Residential Property Andover, LLC, was present regarding a Notice of Project Change for this approved 40B project. He explained that his client has it under agreement for purchase from AA@RG including a change in the funding program. Brown noted that upon his request, Attorney Ward submitted a draft finding. He noted that such changes are not substantial, but conditions upon transfer of ownership. Oltman sat off the remainder of the Notice of Project Change. Bargnesi made a motion to approve the action as drafted. McDonough seconded the motion & the Board voted (5-0) to approve the action as drafted.

Approval of Minutes

7/11/13 – Bargnesi made a motion to approve the minutes of 7/11/13. Boness seconded the motion & the Board voted (6-0) to approve the minutes of 7/11/13.

8/2/13 - Bargnesi made a motion to approve the minutes of 8/2/13. Boness seconded the motion & the Board voted (6-0) to approve the minutes of 8/2/13.

11/6/13 – Oltman made a motion to approve the minutes of 11/6/13. Magenheim seconded the motion & the Board voted (6-0) to approve the minutes of 8/2/13.

Petition No.: 4063

Premises affected: 48 Summer Street

Petitioner: Jeffco

Members: Brown, Magenheim, McDonough, Bargnesi and Boness, and Oltman

Attorney Mark Johnson was present on behalf of his clients, Doug Ahern & George Hughes, of Jeffco, who were also present. Bill MacLeod, project engineer, was also present. Johnson summarized changes since the last meeting: Summer Street garage was relocated, revised site plan was submitted along with a packet including an assessor's map highlighting other multifamilies in the vicinity, the 3,900 sq. ft. foundation, and architectural. MacLeod noted that the garage on Summer Street is now even with the porch at a 28' front setback (formerly 21'). He reviewed the drainage plan that will minimize issues and the grading plan with basement & garage floor elevations. He noted that the roof pitch has been decreased to lessen shading on adjacent lots. Johnson stated the garage heights were decreased from 16' to 14' and lighting on the Washington Street garage will be on sensors. The Board discussed the overall habitable space compared to other houses in the neighborhood (proposed 3900 sf) & building height (34.5' proposed). Johnson stated it is within close range to the neighborhood. The Board discussed with MacLeod the floor elevation relative to the water table & whether it will improve or compound drainage issues based on existing grades/elevations on the lot & street, as well as the proposed grade/elevation on the lot. MacLeod maintains that the drainage issues will not be

compounded. Johnson noted for the record the email from Preservation Commission regarding the proposal. The Board then discussed the request for Party Aggrieved. Johnson explained that the Inspector of Buildings denied a building permit, which they believe should have been issued since the reconstruction meets setbacks under 3.3.5. They have included 3.3.7 if not approved under 3.3.5. Inspector of Buildings Clemente explained that he feels it is a self-created hardship by way of demolition of the existing structure and that the 2-family use in the SRA district is lost once the existing structure is razed. There were some questions from abutters regarding the sections of the bylaw and the definition of front/side/rear yards. Brown explained the bylaw sections & definitions. He emphasized that the house was built prior to the bylaw. Brown focused discussion on Decision No. 802 (1967) that granted a special permit for the use as a 2-family asking if it is qualified as a pre-existing, non-conforming use by virtue of the special permit. Town Counsel deferred to Attorney Johnson who maintains that once the second unit was created, along with subsequent zoning changes, it is a non-conforming use and that the non-conforming use continues. Town Counsel agreed to review case law to be submitted by Johnson on this issue within the next week. McDonough asked if the bylaw regarding the conversion of dwellings existing prior to 1940 applied. Brown was unsure. Bob Ganley, 42 Washington Ave, voiced concern regarding overshadowing of the new structure onto his lot & garden, as well as light overspill. The Board discussed whether the 2-family status is lost after demolition, the legal implications of setting a precedent, the option of adding onto the existing structure (which wouldn't require drainage mitigation), the improvements that will be brought with a new structure (both Preservation Commission & abutters are in favor of a new structure), and the efforts that applicants have made to work with abutters & the Board. Brown asked for a motion to continue the hearing. There was none. Johnson asked the Board to close the hearing. Bargnesi made a motion to close the public hearing. McDonough seconded the motion & the Board voted (4-1) (Brown opposed) to close the hearing. The Board then proceeded to deliberate. The Board first considered the request for review of the Inspector's denial of a building permit as Party Aggrieved. Bargnesi, Oltman & McDonough agreed that the inspector was correct in denying the building permit. McDonough made a motion to uphold the Inspector's decision. Oltman seconded the motion & the Board voted (5-0) to uphold the Inspector's decision to deny a building permit. The Board then considered the requests for special permits: Section 3.3.2 and/or 3.3.7. Boness is not in favor of a special permit under 3.3.7 because the proposed structure is not the same volume or area as the existing. Brown noted that it can be larger in volume & area with a special permit. Johnson asked the Board if they would re-open the public hearing to discuss Section 3.3.2. McDonough made a motion to re-open the public hearing for the sole purpose of discussion Section 3.3.2. Bargnesi seconded the motion & the Board voted (5-0) to re-open the public hearing. Johnson argued that the current non-conforming use, allowed by special permit, can continue if the Board grants a special permit for its continued use under Section 3.3.2. Continuation of said use is not more detrimental. In the alternative, under Section 3.3.7, after demolition, a non-conforming structure that is larger in volume can be constructed by special permit. Town Counsel informed the Board that he is not prepared to address this case since he has no prior knowledge of it & was asked to attend this evening regarding the 40B. Bargnesi made a motion to close the public hearing. There was no second to the motion. Boness expressed uncertainty as to the legal issue. Johnson argued that the legal issue is redundant since a special permit under 3.3.2 can be granted for the non-conforming use and the board can make a determination under that section or 3.3.7. The Board considered if the 2-family, non-conforming use is lost if the existing structure is demolished. Boness questioned if 3.3.2 changes it to a conforming use. Johnson stated that he believes it does. Town Counsel requested case law on the subject. Brown announced that the public hearing will remain open for the purpose of a straw vote. Bargnesi & McDonough stated their favor for a special permit under either section. Boness clarified that 3.3.7 is specifically for structures while 3.3.2 is specifically for the use adding that he wants additional information, including legal advice. McDonough made a motion to continue the public hearing to 1/2/14. Oltman seconded the motion & the Board voted (5-0) to continue to 1/2/14. Brown reminded Johnson to submit the requested case law within a week. Urbelis agreed to respond within a week.

Petition No.: 3803

Premises affected: 0 & 86 River Street

Petitioner: Taylor Cove

Members: Brown, Magenheimer, McDonough, Bargnesi and Boness, and Oltman

Attorney Don Borenstein was present on behalf of Todd Wacome, principal of Taylor Cove, requesting a modification of the comprehensive permit, specifically to allow 16 of the market rate units to have the option for an expanded floor plan. The Board had asked for the construction schedule ratio of affordable units to market rate units. Borenstein stated that the project will abide by the existing condition of constructing 1 affordable unit after the first 6 market rate units, and then 1 out of every 4 units will be affordable. The Board had also asked how the proposed change advances the town's need for affordable housing. Borenstein emphasized that this is a limited dividend project with profit capped at 20%. Any additional profit goes to the town for use in affordable housing. The proposed change will improve the project through increased taxes collected with higher assessments and increased desirability of all units. The third question related to how the proposed change impacts profits & if the project would be rendered uneconomic without the proposed change. Borenstein explained that the profit would change 1-2% and be at the breakpoint of going from economic to uneconomic at 13-16% profit. Fourthly, the Board had asked what can be done to address the concern that the additional floor space will be used as a bedroom. Borenstein informed the Board that his client is willing to accept a condition that no unit can have more than 3 bedrooms (he drafted a condition to this effect) and that they agree to put a restriction in the condo documents. He noted that the floor plans are designed to prevent the conversion to sleeping areas. Borenstein was able to obtain a statement by email from MassHousing stating that 40B does not require exactness between the market & affordable units. The Board discussed how it is difficult to enforce / prevent additional living space conversion to sleeping areas and the need to deal with it architecturally up front to help prevent it in the future, including elimination of lofts and studies. Upon Brown's request, Town Counsel explained that CMR guidance from the State and a case at the HAC (Riverview Commons) regarding insubstantial changes delineated the standard to use in determining whether or not a change is substantial noting that they have to show that a denial would render the project uneconomic. Borenstein disagreed with Counsel, stating that the standard is whether the change is good, which the board can deny and the applicant can appeal based on the argument of the project being uneconomic. Town Counsel disagreed. The Board requested architectural plans depicting the changes. Inspector of Buildings brought to the Board's attention that the affordable units will not have air conditioning and therefore are not equivalent, as Borenstein states that MassHousing has confirmed they shall be equivalent, but not identical. Borenstein disagreed that they have to be appointed the same. Todd Wacome agreed to install air conditioning in all units. McDonough made a motion to continue to 1/2/14. Boness seconded the motion & the Board voted (5-0) to continue to 1/2/14.

The meeting adjourned at 10:32 p.m.